Supreme Court, U.S.
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No. 95-1009

In The

Supreme Court of the United States

October Term, 1995

MILFORD C. HORTON,

Petitioner,

v.

MONROE SYSTEMS FOR BUSINESS, INC., GERALD NEUMANN, MARVIN PASTOR, GERALD TULLY, MICHAEL GARDNER, HAROLD SHORT, and JOHN MISKEW,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

The respondents' suggested reasons for denying the writ are:

- the conflict must not be important since the Fifth Circuit is right and the Seventh Circuit is "clearly wrong" (Brief in Opp. at 4)
- to the extent that the Court reserved the issue in *United States v. Ibarra*, 112 S. Ct. 4 (1991), the issue must not matter because "the two motion issue was expressly noted by the Court in *Ibarra* as not being before it." (Brief in Opp. at 3)
- the Seventh Circuit's position "is out of step with the other cases cited." (Brief in Opp. at 5)
- "the analysis of the Seventh Circuit does not square with the history, purpose, and wording" of the rules (Brief in Opp. at 1).

These are not reasons for certiorari to be denied. They are reasons for certiorari to be granted.

Respondents' view of the merits – that Judges Easterbrook and Posner know nothing about federal jurisdiction, and that they are not up to the job of providing "analysis or reasoning" (Brief in Opp. at 4) – is without support. But respondents' view of the merits is beside the point. The point is that respondents have not made a single valid argument for denying the writ.

The driving question at the petition stage is not which circuit is right. The driving question is whether the Fifth Circuit's refusal to write a full opinion means that

the conflict is out of this Court's reach. The answer is no, and here is why.

The issue presented here is relevant to nearly every appeal in the federal system. It is an issue of subject matter jurisdiction. Its jurisprudential importance is undeniable. Only this Court can furnish a uniform nationwide rule.

To be sure, this Court does not sit simply to correct errors. And it is true that a court of appeals can usually evade this Court's oversight by disposing of a case summarily. But this Court always retains supervisory power over the federal judicial system. Sup. Ct. R. 10.1(a). Certiorari practice must not "risk effectively immunizing summary dispositions by Courts of Appeals" from review, "since it is rare that their basis for decision is entirely unambiguous." *Stutson v. United States*, ___ U.S. ___, ___ (Jan. 8, 1996); *see also Lawrence v. Chater*, ___ U.S. ___, ___ (Jan. 8, 1996) ("the prevalence of summary dispositions by the Courts of Appeals continues to increase with the burgeoning federal docket.").

Here, the "basis for decision" *is* "entirely unambiguous." The decision was not an affirmance but a *dismissal*. Respondents moved for dismissal on only one ground. The court of appeals granted that motion. On petition for rehearing, the court of appeals took the unusual step of asking for a response. All of the papers so far have dealt with the single narrow issue that is presented here. There is no doubt about what the court of appeals did. When a court of appeals summarily dismisses a case on ***jurisdictional grounds,*** this Court's supervisory power should come into play.

We do not lightly refer to the Court's supervisory power as a basis for review, for we know that this power is reserved for rare cases. We would have preferred for the court of appeals to issue a full opinion. Then the inter-circuit conflict would have been more open and obvious, and analyzing the conflict for its cert-worthiness under the traditional criteria would have been easier. But supervision is called for on occasion. This is one of those occasions.

CONCLUSION

The petition should be granted. Alternatively, the Court should use its power under 28 U.S.C. § 2106 to vacate and remand for "such further proceedings to be had as may be just under the circumstances."

Respectfully submitted,

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